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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 TOMMY LaNIER,

11 Plaintiff,

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13
14 v.

15 UNITED STATES OF AMERICA, et
16 al.,

17 Defendants.
18
19

Case No. 15-cv-00360-BAS-BLM

**ORDER GRANTING IN PART
AND DENYING IN PART
DEFENDANT CITY OF CHULA
VISTA'S MOTION FOR
SUMMARY JUDGMENT**

20 Plaintiff Tommy LaNier brings claims for defamation and retaliation against
21 Defendant City of Chula Vista ("City"), alleging the City defamed him and forced
22 him to resign because he complained about sexual harassment directed toward another
23 employee. The City now moves for summary judgment arguing, among other things,
24 that LaNier cannot state a prima facie case of retaliation and that any allegedly
25 defamatory statement was privileged under California law.

26 **BACKGROUND**

27 At the time of the events giving rise to this suit, Plaintiff LaNier was a City of
28 Chula Vista payroll employee working as part of the San Diego-Imperial region of the

1 High Intensity Drug Trafficking Area (“HIDTA”) program. HIDTA is administered
2 by the Office of National Drug Control Policy (“ONDCP”), a component of the
3 Executive Office of the President. HIDTA is not a federal agency or organization
4 itself, but rather a “coordination umbrella” that enables federal, state, and local law
5 enforcement agencies “to combine and leverage resources and capabilities to address
6 drug trafficking and drug-related crime.” (ECF No. 53-2, Exh. A, HIDTA Program–
7 Policy and Budget Guidance (“Guidance”) § 2.3.5.) The Director of ONDCP
8 designates specific areas in the United States as HIDTAs, and then allocates federal
9 funds to designated HIDTAs to support counter-drug activities. (*Id.* § 2.1.3.) The San
10 Diego-Imperial HIDTA (“SDI-HIDTA”) is one such designee.

11 Each HIDTA is governed by an Executive Board comprised of federal, state,
12 and local law enforcement leaders from the designated area. (*Id.* §§ 3.4, 3.4.3.)
13 However, “HIDTAs and their Executive Boards are not considered legal entities under
14 Federal law and generally lack the authority to enter into contracts, hire employees,
15 or obligate federal funds.” (*Id.* § 3.4.5.) Instead, HIDTA Executive Boards select
16 grantees to obligate federal funds. *Id.* The City of Chula Vista is a grantee for the SDI-
17 HIDTA.

18 Under the HIDTA Program Guidance, grantees such as the City “hire
19 employees, issue contracts, manage property, and expend HIDTA program funds as
20 necessary to carry out the grant activities approved by the Executive Board.” *Id.*
21 Specifically, the Guidance provides that “[g]rantees may use HIDTA funds to hire
22 employees or to enter into contracts with individuals to manage and staff the HIDTA.”
23 (*Id.* § 6.8.1.) The use of HIDTA funds “is subject to the respective grantee’s policies
24 and procedures pertaining to property management, employment, procurement, and
25 financial management.” *Id.*

26 Plaintiff LaNier and Defendant Kean McAdam¹ were at all times relevant
27

28 ¹ LaNier’s First Amended Complaint asserts a defamation claim against McAdam. The Court granted summary judgment in McAdam’s favor on that claim in an Order filed August 14, 2017.

1 payroll employees of the City whose positions were funded by the HIDTA program.
2 McAdam served as Director of the SDI-HIDTA. His responsibilities included
3 providing day-to-day program management for HIDTA operations, ensuring that SDI-
4 HIDTA initiatives complied with federal requirements, and advising the Board
5 concerning the performance of HIDTA initiatives. (*Id.* § 3.5.1.) LaNier served as
6 Director of the National Marijuana Initiative (“NMI”), an initiative of the SDI-
7 HIDTA. In this capacity, LaNier frequently traveled to other regions of the United
8 States to provide training related to marijuana interdiction. (ECF No. 56-4, LaNier
9 Decl. ¶ 4.)

10 LaNier alleges the City forced him to resign as NMI Director because he
11 complained that Ralph Partridge, the then Deputy Director of the SDI-HIDTA, was
12 sexually harassing a female SDI-HIDTA staffer named Valerie Taylor. (ECF No. 16.)
13 Partridge’s alleged conduct included bragging to Taylor about the size of his penis,
14 constantly visiting Taylor in her office for hugs and fist bumps, calling Taylor a
15 “fucking cunt” when she rejected his advances, and insinuating that Taylor would be
16 his next wife. (LaNier Decl. ¶ 10; ECF No. 53-4, LaNier Dep. at 54.) LaNier
17 complained to McAdam about the situation, to which McAdam responded that he
18 would “talk to Ralph.” (LaNier Decl. ¶ 10.)

19 In September of 2013, sometime after complaining about Partridge’s conduct,
20 LaNier traveled with a small team to the Puerto Rico HIDTA to assess training needs.
21 When LaNier returned from Puerto Rico, McAdam accused him of having falsified
22 his travel voucher for the trip. On October 16, 2013, the SDI-HIDTA Executive Board
23 held a monthly meeting, including a “closed session” to which McAdam was invited
24 to discuss personal issues involving LaNier. LaNier alleges that during this closed
25 session, McAdam, and the City as McAdam’s employer, defamed him by telling the
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27 (ECF No. 73.) The motion for summary judgment currently before the Court involves only the City
28 of Chula Vista and LaNier, though McAdam’s conduct is relevant given LaNier’s allegations that
McAdam engaged in defamation and retaliation as a City supervisory employee.

1 Board he falsely represented that ONDCP officials requested he travel to Puerto Rico.
2 Following the closed session, the Board voted to give LaNier the option to retire,
3 resign, or be fired from his position. LaNier chose to retire.

4 Based on these allegations, LaNier asserts claims against the City for
5 defamation, and for retaliation under both California's Fair Employment and Housing
6 Act ("FEHA") and Title VII of the Civil Rights Act of 1964. The City now moves for
7 summary judgment on all claims pursuant to Federal Rule of Civil Procedure 56(a).
8 (ECF No. 53.) LaNier opposes. (ECF No. 56.)

9 **LEGAL STANDARD**

10 "A party may move for summary judgment, identifying each claim or defense—
11 or the part of each claim or defense—on which summary judgment is sought." Fed.
12 R. Civ. P. 56(a). Summary judgment is proper when "the movant shows that there is
13 no genuine dispute as to any material fact and the movant is entitled to judgment as a
14 matter of law." *Id.* A fact is "material" if it could affect the outcome of the case under
15 the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248
16 (1986). A dispute of material fact is "genuine" when the evidence is such that a
17 reasonable jury could resolve the issue in favor of the nonmoving party. *Id.*

18 The party moving for summary judgment has the initial burden of
19 demonstrating the absence of a genuine dispute of fact. *Celotex Corp. v. Catrett*, 477
20 U.S. 317, 323 (1986). To meet this burden, the moving party must either (1) produce
21 evidence negating an essential element of the nonmoving party's claim or defense or
22 (2) show that the nonmoving party does not have enough evidence of an essential
23 element of his claim or defense to carry his ultimate burden of persuasion at trial.
24 *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir.
25 2000) (citation omitted). If the moving party fails to carry his initial burden, the
26 nonmoving party has no obligation to produce any evidence, and summary judgment
27 will be denied. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160–61 (1970); *Great Haw.*
28 *Fin. Corp. v. Aiu*, 863 F.2d 617, 619 (9th Cir. 1988) (per curiam). If, however, the

1 moving party carries his initial burden, the nonmoving party must then “go beyond
2 the pleadings” and, by affidavit or other appropriate evidence, demonstrate that there
3 is a genuine dispute for trial. *Celotex*, 477 U.S. at 324.

4 At the summary judgment stage, the court may not make credibility
5 determinations or otherwise weigh the evidence. *Anderson*, 477 U.S. at 255. Rather,
6 “the evidence of the nonmovant is to be believed, and all justifiable inferences are to
7 be drawn in his favor.” *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (per curiam)
8 (alteration omitted) (quoting *Anderson*, 477 U.S. at 255). “If the evidence is merely
9 colorable, or is not significantly probative, summary judgment may be granted.”
10 *Friedman v. Live Nation Merch., Inc.*, 833 F.3d 1180, 1185 (9th Cir. 2016) (quoting
11 *McIndoe v. Huntington Ingalls Inc.*, 817 F.3d 1170, 1173 (9th Cir. 2016)). However,
12 “if a rational trier of fact might resolve the issue in favor of the nonmoving party,
13 summary judgment must be denied.” *T.W. Elec. Serv., Inc. v. Pacific Elec.*
14 *Contractors Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987).

15 DISCUSSION

16 The City moves for summary judgment on LaNier’s FEHA and Title VII
17 retaliation claims on grounds that: (1) the City was not LaNier’s employer; (2) the
18 SDI-HIDTA was LaNier’s “special employer” and therefore solely liable for the
19 alleged retaliation; (3) LaNier did not exhaust his administrative remedies with respect
20 to his Title VII retaliation claim; and (4) LaNier’s evidence is insufficient to state a
21 prima facie case of retaliation. As to LaNier’s defamation claim, the City argues,
22 among other things, that McAdam’s statement to the Board is protected by
23 California’s common interest privilege. The Court first addresses the City’s argument
24 that LaNier failed to exhaust his administrative remedies with respect to his Title VII
25 retaliation claim before turning to the City’s remaining arguments.²

26
27 ² The City requests the Court take judicial notice of (1) the HIDTA Program Policy and Budget
28 Guidance dated September 21, 2012 (“Guidance”) (ECF No. 53-2, Exh. A); (2) a “Worksharing
Agreement” between the California Department of Fair Employment and Housing and the United
States Equal Employment Opportunity Commission for Fiscal Year (“FY”) 2013 (ECF No. 58-2,

1 **A. Exhaustion of Administrative Remedies**

2 The City argues that Lanier failed to exhaust his administrative remedies with
3 respect to his Title VII retaliation claim because he did not file a complaint with the
4 United States Equal Employment Opportunity Commission (“EEOC”). LaNier
5 contends that filing charges with California’s Department of Fair Employment and
6 Housing (“DFEH”) was sufficient to constitute filing charges with the EEOC under
7 the two agencies’ Worksharing Agreement, which provides for automatic “dual-
8 filing” of charges filed with either agency under certain conditions.

9 “A person seeking relief under Title VII must first file a charge with the EEOC
10 within 180 days of the alleged unlawful employment practice, or if, as here, the person
11 initially instituted proceedings with the state or local administrative agency, within
12 300 days of the alleged unlawful employment practice.” *Surrell v. Cal. Water Serv.*
13 *Co.*, 518 F.3d 1097, 1003 (9th Cir. 2008) (citing 42 U.S.C. § 2000e-5(e)(1)). If the
14 EEOC does not bring suit based on the charge, the EEOC must “notify the person
15 aggrieved” that he can file suit. 42 U.S.C. § 2000e-5(f)(1). The notice is accomplished
16 through a right-to-sue letter. Once a person receives a right to sue letter from the

17 _____
18 Exh. J); and (3) an FY 2014 extension of the FY 2013 “Worksharing Agreement” (*Id.*). On summary
19 judgment, documentary evidence such as the Guidance, Worksharing Agreement, and the extension
20 to the Worksharing Agreement must be properly authenticated before being considered by the
21 district court. Here, the Guidance is self-authenticating under Federal Rule of Evidence 902(5) as a
22 “book, pamphlet, or other publication purporting to be issued by a public authority,” and the
23 Worksharing Agreement and its extension are self-authenticating under Federal Rule of Evidence
24 902(1) as domestic public documents that are sealed and signed. Therefore, these documents are
25 properly admissible and will be considered accordingly. The City’s requests for judicial notice are
26 denied as moot.

27 LaNier requests the Court take judicial notice of (1) this Court’s Order Denying City of Chula Vista’s
28 Motion to Dismiss dated February 16, 2016 in the instant case (ECF No. 34), and (2) Valerie Taylor’s
First Amended Complaint filed before this Court in related case No. 15-cv-0586. This request is
granted in part and denied in part. To the extent LaNier requests judicial notice of the existence and
authenticity of the aforementioned court filings, the request is granted. *See In re Icenhower*, 755
F.3d 1130, 1142 (9th Cir. 2014) (citation omitted) (explaining that federal courts may judicially
notice “court filings and other matters of public record”). To the extent LaNier requests judicial
notice of the *truth* of the contents of these documents, the request is denied. *See Lee v. City of Los*
Angeles, 250 F.3d 668, 689–90 (9th Cir. 2001) (explaining that federal courts may not take judicial
notice of facts that are subject to reasonable dispute).

1 EEOC, he has 90 days to file suit. *Id.* § 2000e-5(f)(1).

2 Here, LaNier filed a retaliation charge under the FEHA on June 23, 2014. (ECF
3 No. 56-3, Exh. A.) He received a DFEH Notice of Case Closure and Right to Sue the
4 same day. *Id.* The Notice advised LaNier that to obtain a *federal* right to sue notice,
5 he must file a complaint within 30 days of receipt of the DFEH Notice or within 300
6 days of the alleged unlawful act, whichever was earlier. LaNier never filed a complaint
7 with the EEOC or obtained a federal right to sue notice before adding a Title VII
8 retaliation claim to his Complaint after his case was removed to federal court.

9 LaNier asserts that under the then operative Worksharing Agreement between
10 the EEOC and DFEH, the charges he filed with the DFEH were deemed constructively
11 filed with the EEOC. On the basis of this dual-filing theory, LaNier contends that he
12 was entitled to a federal right to sue letter from the EEOC once the EEOC did not
13 timely act on his charge. LaNier argues that his entitlement to a federal right to sue
14 letter permitted him to bring a Title VII retaliation claim once the EEOC failed to send
15 the letter.

16 Although LaNier's explanation of the dual-filing theory is correct as a general
17 matter, dual-filing is not applicable here. This is because LaNier did not bring a Title
18 VII retaliation claim as part of his initial charges with the DFEH. The June 23, 2014
19 complaint filed with the DFEH alleged retaliation against the City of Chula Vista
20 under the FEHA. There is no mention of Title VII. (*See* ECF No. 56-3, Exh. A.) Thus,
21 the dual-filing provisions of the EEOC-DFEH Worksharing Agreement do not aid
22 LaNier. As a state agency processing a state retaliation claim, the DFEH was not
23 required under the Worksharing Agreement to dual-file LaNier's *state* claim with the
24 EEOC. The EEOC was never notified of LaNier's Title VII retaliation claim, and
25 therefore LaNier was not entitled to a federal right to sue letter. Accordingly, the Court
26 grants the City's motion for summary judgement on LaNier's Title VII retaliation
27 claim on grounds that LaNier failed to exhaust his administrative remedies.

28 **B. Whether the City was LaNier's Employer**

1 The City moves for summary judgment of LaNier's FEHA retaliation claim on
2 grounds that it was not LaNier's "employer" and therefore cannot be held liable for
3 retaliation. LaNier contends that under the HIDTA program, grantees of HIDTA
4 funding such as the City are the employers of any personnel hired to carry out the
5 objectives of the HIDTA.

6 The FEHA prohibits an "employer" from engaging in retaliation. Cal. Govt.
7 Code § 12940(g). Thus, for FEHA protections to apply, there must be "some
8 connection with an employment relationship," although the connection "need not
9 necessarily be direct." *Vernon v. State*, 10 Cal. Rptr. 3d 121, 128 (Ct. App. 2004)
10 (quoting *Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980)). In
11 determining the existence of an employer-employee relationship, courts consider
12 factors such as the payment of salary, the obligation of the defendant to train the
13 employee, the authority of the defendant to hire, promote, discipline or terminate the
14 employee, and the extent of the defendant's right to control and direct the activities of
15 the person rendering service. *Vernon*, 10 Cal. Rptr. 3d at 130. Of these factors, the
16 extent of the defendant's "right to control" is generally considered the most important.
17 *Id.*

18 The City argues that LaNier cannot prove the City was his employer because
19 the City had no right to control Lanier's activities. Specifically, the City contends that
20 LaNier's ultimate supervisor was the SDI-HIDTA Executive Board; that the money
21 for LaNier's position came from the federal HIDTA budget; that the City does not
22 have any authority over SDI-HIDTA operations; and that LaNier worked on a national
23 initiative that supported the national HIDTA program, rather than the City.

24 The relationship between the City and LaNier defies easy categorization. But
25 the City's assertions and evidence do not establish that LaNier cannot prove the City
26 was his employer for purposes of retaliation. Viewing the evidence in the light most
27 favorable to LaNier, there is a triable issue as to whether the City was LaNier's
28 employer.

1 First, notwithstanding the City's attempt to disassociate itself from LaNier,
2 there is evidence of a substantive employment connection. Lanier was on the City of
3 Chula Vista payroll. (LaNier Decl. ¶ 14.) He was assigned a City of Chula Vista
4 employee number. *Id.* As NMI Director, LaNier occupied a "Chula Vista middle
5 management position." (Lanier Decl. Exh. 6-1.) And although the City asserts that no
6 one from the City interviewed LaNier for his position, the evidence also indicates that
7 LaNier's position had to be approved by the Chula Vista City Council. (LaNier Decl.
8 ¶ 14.) Furthermore, when LaNier was hired, he attended a new employee program for
9 City employees and signed a document requiring him to abide by all City of Chula
10 Vista policies and procedures. (*Id.*) When LaNier resigned, he was required to undergo
11 an exit interview with the City's Human Resources Department. At minimum, these
12 factors suggest "some connection with an employment relationship," even if the
13 connection is indirect. *Vernon*, 10 Cal. Rptr. 3d at 128.

14 Second, the unique structure of the HIDTA program would permit a reasonable
15 jury to find that the City was LaNier's employer. The National HIDTA Program
16 Guidance states that "HIDTAs and their Executive Boards are not considered legal
17 entities under Federal law and generally lack the authority to enter into contracts, hire
18 employees, or obligate federal funds." (Guidance § 3.4.5.) Instead, HIDTA Executive
19 Boards select grantees, such as the City here, who in turn "use HIDTA funds to hire
20 employees or . . . enter into contracts with individuals to manage and staff the
21 HIDTA." (Guidance § 6.8.1.) Neither side disputes that LaNier's position depended
22 on federal HIDTA funding provided to the City of Chula Vista. But this fact does not
23 prove the City's point. The obvious inference to be drawn from the Guidance is that
24 the City received HIDTA funding to allow *the City* to hire employees to manage and
25 staff the SDI-HIDTA. That is what happened here. The City received HIDTA funding,
26 and the City hired LaNier to staff the SDI-HIDTA.

27 The Guidance's explanation of the relationship between the Executive Board
28 and the HIDTA Director further suggests why there is a triable issue as to the City's

1 status as LaNier's employer. Although the Guidance states that the Board selects an
2 individual to serve as the HIDTA Director (Guidance § 3.4.7.), the Board's actual
3 authority over the Director is expressly limited. The Guidance provides that the
4 individual selected to serve as HIDTA Director "will be an employee or contractor of
5 a grantee and will be subject to all employment, contracting, and other conditions
6 established by that grantee." *Id.* Such is the case here. The Board selected McAdam
7 to serve as Director of the SDI-HIDTA, and then McAdam was hired as an employee
8 of the City of Chula Vista. (ECF No. 53-3, McAdam Decl. ¶ 5.) By the terms of the
9 Guidance, McAdam was subject to all employment conditions established by the City.
10 On this record, it is reasonable to infer that LaNier, who was hired into a City of Chula
11 Vista middle management position, was similarly subject to all employment
12 conditions established by the City.

13 Finally, there are important policy implications should the Court decide as a
14 matter of law, at this stage of the litigation, that the City was not LaNier's employer.
15 For one thing, if the City was not LaNier's employer, it is unclear who so qualifies.
16 HIDTA is a "program," not a suable entity, and the Executive Board neither hired
17 LaNier nor paid his salary. To decide on summary judgment that the City was not
18 LaNier's employer would run counter to the principle that FEHA provisions are to be
19 construed broadly to effectuate the statute's remedial purpose. *Yanowitz v. L'Oreal*
20 *USA, Inc.*, 116 P.3d 1123, 1139 n.14 (Cal. 2005) (explaining that provisions of the
21 FEHA "are to be construed broadly and liberally in order to accomplish its purposes").
22 For another thing, it seems improper to allow the City to take advantage of federal
23 funds and then escape responsibility for the employees it hires pursuant to those funds.
24 If the City wishes to enjoy the benefits of its status as a HIDTA grantee, it is not
25 unreasonable to require it be bound as an employer to the personnel it hires with
26 HIDTA funds.

27 The Court is aware that this case does not present the typical employer-
28 employee relationship. But the fact that the City did not exercise day-to-day control

1 over LaNier does not conclusively establish that the City was not his employer. Under
2 the circumstances presented here, there is a genuine dispute of fact as to whether the
3 City was LaNier’s employer for purposes of his retaliation claim. Accordingly, the
4 City’s motion for summary judgment on this ground is denied.

5 **C. Whether HIDTA was a “Special Employer”**

6 The City next argues for summary judgment on grounds that the SDI-HIDTA
7 Executive Board was LaNier’s “special employer” and thus responsible for any
8 alleged retaliation that took place while LaNier was assigned to the SDI-HIDTA. The
9 City points to evidence that LaNier worked on a HIDTA initiative (rather than on
10 assignments for the City) and stresses that the City “maintained no authority over the
11 SDI HIDTA’s operations.” (Mot. Summ. J. 18:3).

12 At common law, a special employment relationship arises when a “‘general’
13 employer . . . lends an employee to another employer and relinquishes to the
14 borrowing employer all right of control over the employee’s activities.” *State ex rel.*
15 *Dep’t of Cal. Highway Patrol v. Superior Court*, 343 P.3d 415, 417 (Cal. 2015)
16 (quoting *Marsh v. Tilley Steel Co.*, 606 P.2d 355, 358–59 (Cal. 1980)). “During this
17 period of transferred control, the special employer becomes solely liable under the
18 doctrine of respondeat superior for the employee’s job-related torts.” *Id.* A special
19 employer can only qualify as such when it has “power to supervise the details of the
20 employee’s work.” *Marsh*, 606 P.2d at 359. “Mere instruction by the borrower on the
21 result to be achieved will not suffice.” *Id.*

22 Here, there is a genuine dispute as to whether the Board qualifies as a “special
23 employer.” Although the Guidance makes clear that the Board sets the overall strategy
24 for the HIDTA, the City makes no showing that the Board either possessed or
25 exercised “power to supervise the details of [LaNier’s] work.” *Marsh*, 606 P.2d at
26 359. Indeed, the Board’s responsibility to “provid[e] direction and oversight” in
27 setting goals for the HIDTA, (Guidance § 3.4.2), sounds similar to the “mere
28 instruction . . . on the result to be achieved” that the California Supreme Court has

1 said is insufficient to find a special employment relationship, *Marsh*, 606 P.2d at 359.

2 Nor has the City shown the absence of a genuine dispute as to one of the
3 prerequisites to a special employment relationship—the general employer’s
4 relinquishment of all right of control over the employee’s activities. Of course, LaNier
5 was part of the SDI-HIDTA staff, and his day-to-day work supported that program.
6 But to say LaNier supported the HIDTA full-time is not the same as proving the City
7 relinquished “all right of control” over LaNier’s activities. *Marsh*, 606 P.2d at 359.
8 One of the more mundane examples of the City’s right of control is the fact that
9 LaNier, as NMI Director, was required to fully comply with all City policies and
10 procedures regarding time and attendance, scheduling, and leave requests. (LaNier
11 Decl. Exh. 6-2.) This administrative control may not seem like much compared to a
12 hypothetical situation where the City was directing LaNier’s every move. But the
13 City’s administrative control does suggest a right of more direct control, even if that
14 right was not exercised. This is an especially reasonable inference given that the
15 Executive Board—the alleged “special employer”—did not exercise the control that
16 the City asserts it relinquished to the Board.

17 Finally, some of the circumstances that California courts have identified as
18 tending to negate the existence of a special employment relationship are present here.
19 *Marsh*, 606 P.2d at 359. For example, LaNier was not paid by the Board, and the
20 evidence suggests he could not be discharged by the Board absent the Board’s
21 “consultation” with the City. (Guidance §§ 3.4.7, 3.4.8.) Furthermore, as NMI
22 Director, LaNier was “a skilled worker with substantial control over operational
23 details,” another factor that undercuts a finding of special employment. *Marsh*, 606
24 P.2d at 359.

25 In sum, the City has not shown it is entitled to summary judgment on grounds
26 that the Board was LaNier’s special employer. The evidence and reasonable
27 inferences drawn therefrom show a genuine dispute on this issue. Accordingly, the
28 City’s motion for summary judgment on this ground is denied.

1 **D. Retaliation under the FEHA**

2 California’s FEHA prohibits employers from retaliating against employees who
3 oppose or object to discrimination and harassment in the workplace. Cal. Govt. Code
4 § 12940(h). To establish a prima facie case of retaliation under the FEHA, a plaintiff
5 must show “(1) he or she engaged in a protected activity, (2) the employer subjected
6 the employee to an adverse employment action, and (3) a causal link existed between
7 the protected activity and the employer’s action.” *Yanowitz*, 116 P.3d at 1130. Under
8 the FEHA, “[t]he prima facie burden is light; the evidence necessary to sustain the
9 burden is minimal.” *Moore v. Regents of the Univ. of Cal.*, 206 Cal. Rptr. 3d 841, 857
10 (Ct. App. 2016).

11 FEHA claims are governed by the well-known *McDonnell Douglas* burden-
12 shifting framework applied to Title VII claims. *See McDonnell Douglas v. Green*, 411
13 U.S. 792 (1973). Under this framework, once the plaintiff establishes a prima facie
14 case, the burden then shifts to the defendant to articulate a legitimate, non-retaliatory
15 reason for the adverse employment action. *Yanowitz*, 116 P.3d at 1130. If the employer
16 produces a legitimate, non-retaliatory reason for the adverse employment action, “the
17 presumption of retaliation ‘drops out of the picture,’ and the burden shifts back to the
18 employee to prove intentional retaliation.” *Yanowitz*, 116 P.3d at 1130 (quoting
19 *Morgan v. Regents of Univ. of Cal.* 105 Cal. Rptr. 2d 652, 665 (Ct. App. 2008)).

20 **a. Protected Activity**

21 The City argues that LaNier cannot prove he engaged in protected activity.
22 Specifically, the City asserts that LaNier could not have reasonably believed that
23 Ralph Partridge’s conduct toward Valerie Taylor was unlawful.

24 An employee’s opposition to an employment practice is protected under the
25 FEHA so long as the employee had a reasonable and good faith belief that the practice
26 was unlawful. *Yanowitz*, 116 P.3d at 1131–32. The opposed conduct need not actually
27 be unlawful for an employee’s opposition to be protected. *Id.* at 1131 n.4 (“[I]t is good
28 faith and reasonableness, not the fact of discrimination, that is the critical inquiry in a

1 retaliation case.”).

2 Here, LaNier asserts he engaged in protected activity by complaining to
3 McAdam about Partridge’s alleged behavior toward Taylor, which included bragging
4 to Taylor about the size of his penis, constantly visiting Taylor in her office for hugs
5 and fist bumps, calling Taylor a “fucking cunt” when she rejected his advances, and
6 insinuating that Taylor would be his next wife. (LaNier Decl. ¶ 10; LaNier Dep. at
7 54.) LaNier asserts that he complained because he believed Partridge’s conduct
8 constituted sexual harassment and created a hostile work environment.

9 LaNier could reasonably believe that Partridge’s conduct violated the FEHA.
10 The FEHA’s “prohibition against sexual harassment includes protection from a broad
11 range of conduct, ranging from expressly or impliedly conditioning employment
12 benefits on submission to or tolerance of unwelcome sexual advances, to the creation
13 of a hostile work environment that is hostile or abusive on the basis of sex.” *Lyle v.*
14 *Warner Bros. Television Prods.*, 132 P.3d 211, 219 (Cal. 2006) (quoting *Miller v.*
15 *Dep’t of Corrections*, 115 P.3d 77, 87 (Cal. 2005)). The conduct about which LaNier
16 complained—including Partridge bragging about the size of his penis—bears
17 reasonable resemblance to the categories of conduct relevant to sexual harassment
18 claims.

19 The City argues that Partridge’s conduct was too isolated and sporadic to meet
20 the legal threshold for hostile work environment sexual harassment. This may or may
21 not be true, but the accuracy of LaNier’s legal conclusions is irrelevant. An employee
22 is not expected to thoroughly assess case law and statutes before opposing conduct he
23 reasonably believes to be unlawful. *See Yanowitz*, 116 P.3d at 1131 (“It is well
24 established that a retaliation claim may be brought by an employee who has
25 complained of or opposed conduct that the employee reasonably believes to be
26 discriminatory, even when a court later determines the conduct was not actually
27 prohibited by the FEHA.”). Here, LaNier could reasonably believe that Partridge’s
28 crude conduct and insulting remarks were unlawful. Thus, the evidence is sufficient

1 to satisfy this element of LaNier's prima facie case of retaliation.

2 **b. Adverse Employment Action**

3 The City argues that LaNier cannot prove the City subjected him to an adverse
4 employment action because the Board, rather than the City, voted to terminate LaNier.
5 This argument misses the mark for at least two reasons.

6 First, the evidence supports the reasonable inference that the City was at least
7 partly responsible for LaNier's forced resignation. Although the Board voted to
8 terminate LaNier, the Guidance suggests the Board could only do so with the
9 concurrence of the City. This inference follows from the limits of the Board's
10 authority to remove McAdam. (*See* Guidance § 3.4.7 (providing that the Executive
11 Board may remove a HIDTA Director or significantly limit his or her authority only
12 "in consultation with the grantee"). If McAdam, who holds a City supervisory
13 position, can only be removed in consultation with the City, then it is reasonable to
14 infer that LaNier, who served in a City middle management position, could only be
15 removed in consultation with City as well. Of course, this is not the only inference
16 that may be drawn, but it is a reasonable one. *O'Day v. McDonnell Douglas Helicopter*
17 *Co.*, 79 F.3d 756, 761 (9th Cir. 1996) (explaining that on summary judgement, courts
18 "entertain every reasonable inference in favor of the non-moving party"). On this
19 record, a reasonable jury could find that the City subjected LaNier to an adverse
20 employment action by consulting with the Board and ultimately processing LaNier's
21 retirement.

22 Second, even assuming that the Board was solely responsible for LaNier's
23 forced resignation, a reasonable jury could find that McAdam's act of reporting to the
24 Board was itself an adverse action. For purposes of FEHA retaliation claims, an
25 adverse employment action is one that materially affects the terms, conditions, or
26 privileges of employment. *Yanowitz*, 116 P.3d at 1137. This includes not only
27 termination or demotion, "but also the entire spectrum of employment actions that are
28 reasonably likely to adversely and materially affect an employee's job performance

1 or opportunity for advancement in his or her career.” *Id.* at 1138. Here, a reasonable
2 jury could find that McAdam’s action—that is, accusing LaNier of serious ethical
3 misconduct in front of the Board—was an adverse employment action given that the
4 report could jeopardize LaNier’s continued employment with the City. On this record,
5 then, the evidence is sufficient to establish the second element of LaNier’s prima facie
6 case of retaliation.

7 **c. Causal Connection**

8 The City argues LaNier cannot prove a causal connection between his protected
9 activity and an adverse employment action because he did not contact anyone at the
10 City about the alleged harassment.

11 Retaliation claims under FEHA require proof that the unlawful retaliation
12 would not have occurred “but for” the alleged wrongful actions of the employer.
13 *Reeves v. Safeway Stores, Inc.*, 16 Cal. Rptr. 3d 717, 726 (Ct. App. 2004). The
14 requisite causal link may be inferred from circumstantial evidence such as evidence
15 of “the employer’s knowledge that the employee engaged in protected activities and
16 the proximity in time between the protected action and the allegedly retaliatory
17 employment decision.” *McRae v. Dep’t of Corr. & Rehab.*, 48 Cal. Rptr. 3d 313, 321
18 (Ct. App. 2006) (citation omitted).

19 Here, there is a genuine dispute as to whether LaNier’s complaints to McAdam
20 about Partridge’s alleged conduct can be imputed to the City, such that the City was
21 aware LaNier had engaged in protected activity. McAdam was a Chula Vista
22 supervisory employee “subject to all employment . . . and other conditions”
23 established by the City. (Guidance § 3.4.7.) LaNier was a Chula Vista middle
24 management employee who, upon being hired, signed a document obligating him to
25 abide by the City’s policies and procedures as part of his employment. (LaNier Decl.
26 ¶ 14.) LaNier also asserts that he understood McAdam to be an employee of the City.
27 On this evidence, it was reasonable for LaNier to believe that contacting McAdam, a
28 supervisor, about Partridge’s alleged harassment was tantamount to contacting the

1 City. McAdam even intimated he would address the situation by “talk[ing] to Ralph.”
2 (LaNier Decl. ¶ 10.) Thus, a reasonable jury could find that McAdam’s knowledge of
3 the alleged harassment is properly imputed to the City. *Reeves v. Safeway Stores, Inc.*,
4 16 Cal. Rptr. 3d at 727 n.9 (“An employer can generally be held liable for the
5 discriminatory or retaliatory actions of supervisors.”) (citation omitted).

6 In sum, the City has failed to show that LaNier’s evidence is insufficient to state
7 a prima facie case of retaliation under the FEHA. The City’s motion for summary
8 judgment on this ground is denied.

9 **E. Defamation**

10 The City moves for summary judgment on LaNier’s defamation claim on
11 various grounds, one of which is that any allegedly defamatory statement made by
12 McAdam was protected by California’s common interest privilege set forth in
13 California Civil Code § 47(c).³ The Court agrees summary judgment is appropriate on
14 this ground.

15 To prove defamation under California law, a plaintiff must show the intentional
16 publication of a statement of fact that is false, unprivileged, and has a natural tendency
17 to injure or cause special damage. *Family Home & Fin. Ctr., Inc. v. Fed. Home Loan*
18 *Mortg. Corp.*, 525 F.3d 822, 826 (9th Cir. 2008) (quoting *Smith v. Maldonado*, 85 Cal.
19 *Rptr. 2d* 397, 402 (1999)). Under the common interest privilege set forth in Cal. Civ.
20 Code § 47(c), “a defendant who makes a statement to others on a matter of common
21 interest is immunized from liability for defamation so long as the statement is made
22 without malice.” *Lundquist v. Reusser*, 875 P.2d 1279, 1279 (Cal. 1994). The
23 defendant has the initial burden of showing that the allegedly defamatory statement
24 was made on a privileged occasion. *Id.* at 1284. The burden then shifts to the plaintiff
25 to show the defendant made the statement with “actual malice.” *Id.*

26 A plaintiff may establish actual malice in two ways: (1) “by a showing that the
27

28 ³ In making this argument, the City assumes that McAdam is a City employee.

1 publication was motivated by hatred or ill will towards the plaintiff,” or (2) “by a
2 showing that the defendant lacked reasonable grounds for belief in the truth of the
3 publication and therefore acted in reckless disregard of the plaintiff’s rights.” *Sanborn*
4 *v. Chronicle Pub. Co.*, 556 P.2d 764, 768 (Cal. 1976) (quoting *Roemer v. Retail Credit*
5 *Co.*, 119 Cal. Rptr. 82, 88 (Ct. App. 1975)). To prove reckless disregard, a plaintiff
6 must show the defendant “made the false publication with a high degree of awareness
7 of . . . probable falsity, or must have entertained serious doubts as to the truth of his
8 publication.” *Young v. CBS Broad., Inc.*, 151 Cal. Rptr. 3d 237, 245 (Ct. App. 2012)
9 (citations omitted) (quoting *Harte-Hanks Commc’ns v. Connaughton*, 491 U.S. 657,
10 667 (1989)). “When a plaintiff fails to raise triable issues of fact regarding whether a
11 defendant acted with reckless disregard, a court may grant summary judgment in favor
12 of the defendant as a matter of law.” *Pashman v. Aetna Ins. Co.*, No. C–13–02835
13 DMR, 2014 WL 3571689, at *19 (N.D. Cal. July 18, 2014).

14 As an initial matter, the Court finds there is no genuine dispute as to whether
15 McAdam’s statement was made on a privileged occasion. McAdam made the
16 statement to the SDI-HIDTA Executive Board, a body charged with “providing
17 direction and oversight in establishing and achieving the goals for the [SDI-]HIDTA.”
18 (Guidance § 3.4.2.) In light of its oversight responsibilities, the Board had a legitimate
19 interest in the conduct of LaNier, who was in charge of an important SDI-HIDTA
20 initiative, and whose business travel was paid for with HIDTA funds. (LaNier Decl.
21 Exh. 6-1.) McAdam shared this interest in LaNier’s conduct given that McAdam’s
22 responsibilities included “day-to-day administrative, financial, and program
23 management for the operations of the HIDTA” and advising the Board “concerning
24 the performance of HIDTA initiatives,” such as the NMI. (Guidance § 3.5.1.) Thus,
25 McAdam’s statement to the Board concerning LaNier’s allegedly false justification
26 for traveling to Puerto Rico was “a statement to others on a matter of common
27 interest,” and is privileged absent actual malice. *Lundquist*, 875 P.2d at 1279.

28 LaNier does not dispute that McAdam’s statement was made on a privileged

1 occasion; rather, he asserts summary judgment should be denied because there is a
2 genuine dispute as to whether McAdam made the statement with actual malice.
3 Specifically, LaNier contends McAdam did not have reasonable grounds to believe
4 the truth of his statement to the Board and therefore acted with reckless disregard. The
5 City argues there is no triable issue on this point because: (1) LaNier testified during
6 his deposition that he told McAdam that ONDCP officials Shannon Kelly and Mike
7 Gottlieb asked him to travel to Puerto Rico, and (2) McAdam spoke with Kelly and
8 Gottlieb before making the allegedly defamatory statement to the Board, and both of
9 them denied directing or requesting LaNier to travel to Puerto Rico.

10 LaNier's evidence that McAdam lacked reasonable grounds for believing the
11 truth of his statement consists of the following: (1) a July 11, 2013 email from
12 Shannon Kelly asking LaNier to "reach out" to Mike Roy, Director of the Puerto Rico
13 HIDTA, regarding possible "guidance" on marijuana operations (LaNier Decl. Exh.
14 3); (2) an email from McAdam to Roy, sent prior to LaNier making the trip to Puerto
15 Rico, in which McAdam touted LaNier's expertise (*Id.* Exh. 4-1); (3) the fact that
16 there is no policy requiring ONDCP to request or direct any business trip of LaNier
17 within the United States or its territories (*Id.* ¶ 8, Exh. 6-2); (4) the fact that McAdam
18 has nothing in writing from Mike Gottlieb indicating Gottlieb disapproved of the
19 Puerto Rico trip (ECF No. 56-1, Lynn Decl. Exh. B-7); (5) McAdam's admission that
20 he was "irritated" by the situation involving Partridge and Taylor in the SDI-HIDTA
21 office and that he knew LaNier was complaining about Partridge's conduct on behalf
22 of Taylor (*Id.* Exh. F); (6) the fact that the Board did not undertake an independent
23 investigation to verify McAdam's statement regarding LaNier's alleged
24 untruthfulness (*Id.* Exh. A-3); and (7) the fact that during LaNier's exit interview,
25 McAdam told LaNier his termination was not related to his job performance (LaNier
26 Decl. ¶ 9).

27 The Court finds LaNier's evidence, taken as true, does not raise a genuine
28 dispute as to whether McAdam lacked reasonable grounds to believe the truth of his

1 statement to the Board.

2 First, the July 11, 2013 email from Kelly asking LaNier to “reach out” to Mike
3 Roy is irrelevant to McAdam’s grounds for belief because there is no evidence
4 McAdam was copied on, or was otherwise aware of, the email. And even if McAdam
5 had read the email, Kelly’s request for LaNier to “reach out” to Roy does not support
6 the inference that McAdam should have interpreted the email as Kelly asking or
7 directing LaNier to travel to Puerto Rico. *See Villiarimo v. Aloha Island Air, Inc.*, 281
8 F.3d 1054, 1065 n.10 (9th Cir. 2002) (citation omitted) (explaining that on summary
9 judgment the court need not draw *all* possible inferences in non-movant’s favor, but
10 only all *reasonable* ones). Indeed, LaNier testified at his deposition that he did not
11 think anything in Kelly’s July 11, 2013 email suggested that he travel to Puerto Rico.⁴

12 Second, McAdam’s email to Roy touting LaNier’s expertise does not
13
14

15 ⁴ At his January 7, 2015 deposition, LaNier testified as follows:

16 “Q. Exhibit 22 is an email from Shannon Kelly to you dated July 11, 2013.

17 You’ve seen this before, haven’t you?

18 A. [LaNier] Yes, I have.

19 Q. You spoke to her on July 11, right?

20 A. [LaNier] After I received this email.

21 Q. You don’t read anything in this email, Exhibit 22, do you, that suggests you
22 travel to Puerto Rico?

23 A. [LaNier] No.

24 Q. And in the conversation you had with Ms. [] Kelly on July 11 after you got
25 this email, was there anything she said that suggested to you that she or
26 anybody in ONDCP wanted you to travel to Puerto Rico?

27 A. [LaNier] No.”

28 (ECF No. 46-1, Stayton Decl., Exh. E, LaNier Dep. 524:20–525:11.)

1 undermine McAdam's basis for belief in the truth of his statement. There is no
2 contradiction in McAdam respecting LaNier's subject matter expertise and later
3 forming a reasonable belief that LaNier lied about ONDCP directing or requesting the
4 trip to Puerto Rico. Furthermore, McAdam's statement in the email that "[m]y
5 understanding is that ONDCP suggested [the trip]" is not significantly dispositive
6 where there is no basis to find that McAdam's "understanding" came from ONDCP
7 rather than from LaNier himself. Here, the evidence shows that LaNier told McAdam
8 that ONDCP requested and directed he travel to Puerto Rico, and that McAdam
9 learned from ONDCP that that was not the case (ECF No. 46-1, Stayton Decl., Exh.
10 D, LaNier Dep. 271:9–272:2; ECF No. 53-3, Exh. B ("McAdam Decl.") ¶¶ 19, 20).⁵
11 On this record, McAdam's email to Roy does not raise a genuine dispute of fact as to
12 McAdam's grounds for believing LaNier had been untruthful.

13 Third, the fact there is no official policy requiring ONDCP to request or direct
14 LaNier's business-related travel is irrelevant to McAdam's belief in the truth of what
15 he told the Board. McAdam did not tell the Board LaNier traveled to Puerto Rico
16 without required ONDCP authorization. Rather, McAdam allegedly told the Board
17 that LaNier falsely represented ONDCP had requested and directed the trip be taken.
18 These are separate and distinct issues. The fact that LaNier did not *need* an ONDCP
19 request to travel does not call into question evidence showing LaNier told McAdam
20 that he *received* such a request. Therefore, the lack of an official policy requiring
21 ONDCP to request or direct LaNier's travel does not create a genuine dispute as to
22 whether McAdam reasonably believed LaNier lied about traveling at ONDCP's
23

24 ⁵ LaNier attempts to dispute this evidence by citing the LaNier Declaration ¶¶ 4–8. But nothing in
25 the paragraphs cited controverts McAdam's evidence that LaNier told him ONDCP requested and
26 directed he travel to Puerto Rico, and that he learned from ONDCP that that was not the case. Taken
27 as true, the portions of the LaNier Declaration cited by LaNier establish that (1) McAdam authorized
28 the Puerto Rico trip, (2) McAdam was under the impression ONDCP suggested the trip, (3)
McAdam's authorization was the only authorization required for LaNier to travel, and (4) Kelly and
Gottlieb were aware LaNier would be traveling to Puerto Rico. At no point in the LaNier Declaration
does LaNier deny having told McAdam that ONDCP requested and directed the trip, or challenge
McAdam's account of his conversation with ONDCP on the issue.

1 behest.

2 Fourth, the fact that McAdam has nothing in writing indicating Gottlieb
3 disapproved of the Puerto Rico trip does not create a genuine dispute of fact regarding
4 reckless disregard. For one thing, the issue is not whether ONDCP “approved” or
5 “disapproved” of the trip; the issue is whether ONDCP specifically requested or
6 directed LaNier to take the trip. In addition, LaNier does not explain how the lack of
7 something in writing from Gottlieb creates a triable issue where the evidence shows
8 McAdam spoke with Gottlieb before making the allegedly defamatory statement to
9 the Board. (McAdam Decl. ¶¶ 18–20.)

10 Fifth, McAdam’s admission that he was “irritated” by alleged incidents of
11 sexual harassment in the SDI-HIDTA office, and aware of LaNier’s role in
12 complaining about the harassment on Taylor’s behalf, does not raise a genuine dispute
13 as to whether McAdam had reasonable grounds for his statement to the Board.
14 Although the evidence supports the reasonable inference that McAdam was frustrated
15 with LaNier, such frustration could only support a finding of malice to the extent it
16 impacted McAdam’s “actual belief” concerning the truthfulness of his statement. *See*
17 *Harkonen v. Fleming*, 880 F. Supp. 2d 1071, 1081 (N.D. Cal. 2012) (explaining that
18 the focus of the actual malice inquiry is on “the defendant’s attitude toward the truth
19 or falsity of the material published,” not “the defendant’s attitude toward the
20 plaintiff”) (quoting *Christian Research Inst. v. Alnor*, 55 Cal. Rptr. 3d 600, 618 (Ct.
21 App. 2007)); *Reader’s Digest Ass’n v. Superior Court*, 690 P.2d 610, 619 (Cal. 1984)
22 (explaining that “mere proof of ill will” is insufficient to prove actual malice). Here,
23 McAdam spoke to Kelly and Gottlieb *before* communicating to the Board his belief
24 that LaNier had been untruthful. Thus, even if McAdam was frustrated with LaNier,
25 LaNier has not raised a genuine dispute of fact that this frustration impacted
26 McAdam’s belief in the truth of his statement.

27 Sixth, the fact that the Board did not independently investigate the truth of
28 McAdam’s statement is irrelevant. McAdam is the person who made the allegedly

1 defamatory statement and so it his basis for belief in the truth of the statement that
2 matters, not the Board's.

3 Seventh, the fact that McAdam told LaNier during LaNier's exit interview that
4 his termination was not related to job performance does not raise a triable issue as to
5 reckless disregard. To prove reckless disregard, a plaintiff must provide evidence that
6 the defendant had a high degree of awareness that the statement in question was
7 probably false, or that the defendant entertained serious doubts about the truth of the
8 statement. *Young*, 151 Cal. Rptr. 3d at 245. McAdam's basis for believing the truth of
9 his statement was his conversation with Kelly and Gottlieb before speaking to the
10 Board. Thus, the fact that McAdam told LaNier his termination was not related to
11 performance does not raise a genuine dispute as to whether McAdam lacked
12 reasonable grounds for believing the truth of his statement.

13 In sum, the City has shown that McAdam's statement to the Board involved a
14 matter of common interest, and LaNier's evidence, and reasonable inferences drawn
15 therefrom, fail to raise a genuine dispute of fact regarding actual malice. Thus, the
16 common interest privilege of Cal. Civ. Code § 47(c) applies, McAdam is protected
17 from liability for his statement to the Board, and by extension, the City is protected
18 from liability even if it is deemed to be McAdam's employer.


19 CONCLUSION

20 For the foregoing reasons, the City's motion for summary judgment is
21 GRANTED IN PART and DENIED IN PART. (ECF No. 53.)

22 Summary judgement is granted in favor of the City on LaNier's Title VII
23 retaliation claim and defamation claim. Summary judgement is denied on LaNier's
24 FEHA retaliation claim.

25 **IT IS SO ORDERED.**

26
27 **DATED: September 25, 2017**

28

Hon. Cynthia Bashant
United States District Judge